

APLC

ALABAMA PRO-LIFE COALITION, INC.

TO: Interested Persons
FROM: A. Eric Johnston
DATE: April 2024

RE: IN VITRO FERTILIZATION AND THE LAW IN ALAAMA

The recent Alabama Court case of *LaPage et al, v. Center for Reproductive Medicine, PC, et al*, did not outlaw *in vitro* fertilization (“IVF”). Also, the case is not about abortion. It is a wakeup call regarding the need to reasonably regulate IVF procedures. APLC does not oppose IVF. Some Coalition members do not agree with the procedure at all, while others accept it. The comments here are mine and not those of the individual APLC Members.

The purpose of this memo is not to make moral judgements in these regards, but to interpret *LaPage* and encourage, as the court said several times, the Alabama Legislature to address the issues. What are the issues?

THE ALABAMA SUPREME COURT OPINION

Clearly it was a majority opinion. At least five of the nine Justices supported the opinion, and it is a likely interpretation that six of the Justices supported it. Those agreed the frozen fertilized egg embryo is a “person” under the Alabama Constitution. The Alabama Constitution preempts any Alabama statute or regulation. The interpretation of the Constitution by the Alabama Supreme Court is the final word on the meaning of state laws. ALA. Const. Art. I, §36.06 states:

- (a) This State acknowledges, declares, and affirms that it is the public policy of this State to recognize and support the sanctity of unborn life and the rights of unborn children, including the right to life.
- (b) This State further acknowledges, declares, and affirms that it is the public policy of this State to ensure the protection of the rights of the unborn child in all manners and measures lawful and appropriate.

The question is to what degree the Legislature may regulate IVF. In *LaPage*, the Justices questioned the congruence of Alabama criminal and civil laws related to unborn life. This discussion was whether all of those laws needed to be in agreement on the definition of life. Those laws included the Brody Act (making an unborn child a person against whom a crime can be committed) and the Alabama Human Life Protection Act (“AHLPA”) (criminalizing abortion), along with its review of IVF. There was a difference of opinion among the Justices. We do not believe that complete congruence is necessary. In the two Acts, the definitions of the unborn child is a fertilized egg implanted in the uterine wall. The reason for these definitions is to provide the pathology for the prosecuting attorney to prove that a crime had been committed. While we all agree, including the Justices and all the parties in *LaPage*, that life begins at conception, that is the adjoining of the sperm and the egg, that cannot be proven in the criminal prosecution context.

On the other hand, the fertilized egg frozen embryo, the subject of IVF, can be proven and observed in the petri dish. Consequently, in order to protect that unborn person, a different standard should apply.

Please note the Constitutional Amendment above refers to “the rights of the unborn child in all manners and measures lawful and appropriate.” This recognizes there are different applications in different situations. For example, the AHLPA recognizes life and certain health exceptions for the mother for abortion, as well as exempting the mother from criminal prosecution. Similarly, the Wrongful Death of a Minor Act, which was the subject of *LaPage*, was a statutory exception to the common law, which did not permit a wrongful death claim because at common law, a right of action died with the person. In each of these laws, the Legislature acted in “manners and measures lawful and appropriate.”

No one should reasonably expect that IVF will be forbidden. It is generally accepted as a way to provide children for families who otherwise are not able to have children. *LaPage* does not outlaw IVF. In fact, it only requires medical professionals to be responsible for their acts, which in this case, was to protect the frozen embryos from destruction, which they did not do. No one is asking that IVF be prohibited, only that it be reasonably regulated.

REGULATION OF IVF

Many sources suggest proper regulation, whereas in Alabama there is now none. The purpose of this memo is not to answer each need, which is beyond our ken, but to suggest some of the areas that must be addressed. We must begin with the axiom that the Supreme Court says the embryo is a person. An extension of the axiom is that the embryo should not be destroyed, unless he or she is determined to be deceased. This may require a consensus of the life expectancy of the embryo. All of us, whether an embryo or a born alive person have a natural life span. We will all die someday. With that understanding, areas to be addressed, *inter alia*, are:

- A standard of care for the process, including for the preserved embryo.
- Proper licensure and certification of IVF health care providers.
- Detailed contracts between providers and parents regarding executory obligations.
- Documented education of parents for the IVF procedures to assure complete informed consent.
- Limiting the number of embryos that will result in fewer surplus embryos.
- Number of embryos transferred from *in vitro* to *in utero*.

- Prohibit genetic testing, i.e. sex, eye color, *etcetera*.
- Adoption procedures for unused or unwanted embryos.
- Prohibition of medical research or experimentation on embryos.
- Who will bear the expense of storing unwanted embryos?
- Ultimately, what is to be done with unwanted embryos?

In response to *LaPage*, the Alabama Legislature passed Senate Bill 159 (Act #2024-20), which retroactively forbids any “action, suit or criminal prosecution for the damage or the death of an embryo.” Compensatory damages only were limited to “the price paid for the impacted in vitro cycle.”

No one should be above the law. Standards must be set for protection of parents and their unborn embryonic children. To pass a law saying that IVF health care professionals are absolutely immune from liability is a derogation of the common law and the protection of rights. We do not suggest that penalties should be the same across the board for born, *in utero* and *in vitro* persons. However, “in all manners and measures lawful and appropriate,” the Legislature should properly deal with this dilemma.

There is a dividing line for parents. In the initial stages of *in vitro*, parents are in the process of “having a child.” They are without doubt excited and anxious, as any expectant parents would be. If a child is lost at this stage, the parents will have lost something very valuable to them. That is essentially what *LaPage* is about. The Plaintiff parents lost their children. On the other hand, when parents have had their child or children, but there are left over embryos, the parents may not be as excited and anxious. Did the value of the embryo change? It did, but it did not. This is one of the difficult issues to be addressed.

THE LEGISLATIVE CHALLENGE

APLC has worked with the Alabama Legislature on over a dozen laws since 1990, in addition to the AHLPA passed in 2018, the strongest abortion prohibition law in the nation. The Alabama Legislature has been a responsive pro-life body. The *LaPage* opinion created an immediate liability issue and placed Alabama IVF clinics in a position of perhaps hundreds of lawsuits being filed by persons who had destroyed embryos, which they may or may not have wanted. The incentive for trial lawyers to file wrongful death of minor lawsuits would be greatly increased. The Legislature chose a remedy in haste, but with the statement that there would be further regulation.

Unfortunately, at least one political organization (not a member of APLC) sent texts about legislators who voted for SB159, saying they “voted to give immunity to any IVF Provider who intentionally causes the death of an unborn child.” This accusation draws a very fine line of culpability. The Defendants in the *LaPage* case did not intentionally cause the death of the embryos. On the other hand, unwanted embryos have, no doubt, been destroyed. The Alabama Legislature does not have the wisdom of Solomon and, we believe, reacted with only a patch to stop litigation, with the representation of addressing the issues sent to it by the Alabama Supreme Court. While we all agree life begins at conception, included as noted by the court and the litigants, the opinion made us realize that IVF is unregulated and now requires us to focus on the reality of our conceptual belief.

During the time abortion was legal for almost fifty years, IVF was not an issue. The taking of unborn life was legal in every state, some up to the time of birth. In that context, the IVF embryonic life was not and could not have been protected. The AHLPA and the *Dobbs* decision, permitting states to regulate or prohibit abortion, were catalysts for us now to address the issue.

While the issue has lain dormant all these years, it is correct to say that *LaPage* caught us unprepared. Those who accuse Legislators of intentionally permitting the taking of life are excessive in their response and fail to recognize there needs to be well reasoned solutions. They demonstrate their ignorance of the complexity of dealing with life issues in a divided legal/political/ethical culture. We respect life no less than they, but, unlike them, we realize accusations do not solve the dilemma.

At the same time, and more significantly, opportunistic Democrat legislators are using these events to demand a re-assessment in Alabama of its position on the sanctity of life. Their ultimate goal is to use the confusion of a less than adequate response to the situation to re-introduce abortion rights in Alabama. For Democrats nationwide, abortion remains one of the most important issues of the 2024 general election. Republicans cannot ignore this. If they do, they will lose offices, but more importantly for supporters of life, we will lose unborn lives. The latest example is the Democrat flipping of the Alabama 10th House district seat held by a Republican for the last 22 years. The winning issue was IVF and reproductive rights. In a national interview with the candidate, CNN called it a “political earthquake” and that she wanted to restore abortion rights in Alabama.

For over forty-nine years the prolife community worked to save as many unborn, handicapped and elderly people as possible. APLC has since 1990 worked to protect all life. We will continue to work for life within the confines of legal, political and medical processes. We do not need to condemn legislators, rather we need to encourage them and work to find reasonable solutions to a true dilemma.

It is imperative that the medical/legal/ethical communities come together in the legislature forum to resolve this dilemma. A willing Legislature is the only modality for doing that. APLC is prepared to work within that context and, in all events, pursue protection of these defenseless unborn persons.